STAR PRECIOUS JENAMI (formerly NDORO)
versus
SHONGWE MICHAEL NDORO
and
TUNIKA PHAENAH MKAHANANA
and
LESEDI VIMBAINASHE NDORO
and
DAKARAI SHONGWE JUNIOR NDORO

HIGH COURT OF ZIMBABWE
MUCHAWA J
HARARE, 1, 14, 17, 21, 31 March 2023 & 24 July 2023

Civil Trial – Ancillary Relief to Divorce

Mr *T.W Nyamakura*, for the plaintiff
Mr *F Munyamani*, for the first defendant
No appearance for the second defendant
Mr *L.T Mapuranga*, for the third and fourth defendants

MUCHAWA J: In this matter the marriage between the plaintiff and first defendant was dissolved by a decree of this court on 26 November 2019 in an initial action where the parties were only the plaintiff, first and second defendant. The second defendant had been cited because of allegations of adultery between her and the first defendant. It appears that the issue of adultery damages was resolved out of court through a deed of settlement of 26 November 2019 with second defendant paying ZWL $20 000.00 and the second defendant ceased to be directly involved in the proceedings hence her nonappearance in the matter before me.

The terms of the divorce decree granted by Honourable CHINAMORA J were as follows:

1. "A decree of divorce be and is hereby granted.
2. The division, apportionment or distribution of the assets acquired during the subsistence of the marriage between the parties be and is hereby deferred for determination on a date to be agreed between the parties and their legal representatives in consultation with the Registrar of the High Court.
3. The plaintiff and the first defendant be and are hereby interdicted from selling, dissipating or otherwise disposing of the assets acquired during the subsistence of their marriage which are listed in the pleadings in HC 9611/18 until the final determination of this court relating to the division, apportionment and distribution of those assets.
4. The costs of suit shall be in the cause pending the final determination by this court of the division, apportionment and distribution of the aforesaid assets."

During the subsistence of the marriage, the first defendant was said to have set up the Serai-Dale Trust as a donor in which he and plaintiff were trustees and together with their children, now third and fourth defendants, they were beneficiaries. It was further alleged that the plaintiff and defendant had set up various companies in which they were directors, and the shares were held by Serai-Dale Trust. The companies' assets were requested to be treated as assets of the spouses. Because part of the relief sought in this matter was that the Serai-Dale Trust be dissolved, the plaintiff made an application for joinder of their two children as third and fourth defendants in this matter. This order was granted by honourable CHIRAWU-MUGOMBA on the 4th of January 2021 as follows:

1. "That the 2nd to the 4th respondents be joined to the proceedings under HC 9611/18 such that the 1st respondent is also cited in his official capacity as a Trustee of Serai-Dale Trust and 3rd and 4th respondent become 3rd and 4th respondents respectively.
2. 2nd respondent be deemed to have already been served with the pleadings filed under case number HC 9611/18 upon service of the amended declaration on the 1st respondent.
3. The respondents be granted leave to plead to the plaintiff's summons and declaration within 10 (ten) days of the date on which service is effected upon them.
4. Applicant's declaration filed under case number HC 9611/18 be amended and the applicant is hereby given leave to file the amended declaration attached to her founding affidavit as Annexure C within ten days of the grant of this order.
5. The costs of the application shall be in the cause under case no. HC 9611/18."

The matter before me remained that of the distribution of the assets of the parties. Though Mr *Mapuranga* appeared for the children, they entered a consent to judgment to the plaintiff's claim. Their position was that both their parents' positions do not prejudice them. They did not participate in the trial.

As the parties continued to engage, they entered a judgment by consent on most of the issues. The terms of the order by consent of 21 March 2023 are as follows:

"IT IS ORDERED BY CONSENT THAT:

1. The plaintiff is awarded as her sole and own property:

1.1 Entire shareholding in the Summerbreak Investments (Private) Limited which owns a certain piece of land situate in the district of Salisbury called Greenclose of Subdivision A of Subdivision D of Nthaba of Glen Lorne measuring 8,4269 hectares held under deed of transfer No. 8448/02 dated 26 July 2002; and

1.2 First defendant's 50% share in stand 16 Newhaven Township of Newhaven Estate A situate in the district of Inyanga measuring 2,5308 hectares held by plaintiff and first defendant under deed of transfer No. 3792/01 dated 4 May 2001 (hereinafter referred to as the Nyanga property); and

1.3 The entire shareholding in Interfruit (Private) Limited and its assets;

1.4 The entire movable assets, goods and effects situate at 19B Wayhill Lane East, Umwinsdale, Harare; and

1.5 A Honda Fit registration number AEV 1188; and

1.6 IVECO Truck registration number ADR 5471; and

1.7 DAF Truck registration number ADV 3972; and

1.8 Mazda Titan Truck registration number ABI 0216; and
1.9 Honda Fit registration number ADX 9582
2. The first defendant be and is hereby awarded as his sole and exclusive property:
2.1 The entire shareholding in Utopia Fresh Exporters (Private) Limited which owns certain piece of land situate in the district of Goromonzi called Lot FD Melfort Estate measuring 186,4028 hectares held under deed of transfer No. 999/97 dated 27 February 1997.
2.2 The entire shareholding in Capcon (Private) Limited which owns stand 348 Marandellas Township measuring 890 square meters and held under deed of transfer 3841/1997.
2.3 The shareholding owned by him in Phaenah Enterprises (Private) Limited; and
2.4 All household goods, effects and farming equipment at Utopia Farm, Melfort; and
2.5 A Land Rover Discovery with registration number ABR 3614; and
2.6 A BMW 650i with registration number ADA 8808; and
2.7 MG Vintage Classic registration number 203-927 J; and
2.8 Porsche Boxster motor vehicle; and
2.9 A speed boat named Chambiyago with registration number NP 16326; and
2.10 Fibercraft Trailer registration number 708-386; and
2.11 Mazda B 1800 pickup registration number AAH 2247; and
2.12 Ventre Elite S Trailer registration number 618-575N
3. First defendant shall sign all the necessary papers to ensure that the shareholding in Summerbreak Investments (Private) Limited and Interfruit (Private) Limited is transferred to plaintiff within seven (7) working days of this order.
4. First defendant shall tender his resignation as director of Summerbreak Investments (Private) Limited and Interfruit (Private) Limited within seven (7) days of this order or otherwise be deemed to have resigned at the expiration of the period contemplated by this clause, whichever occurs first.
5. Plaintiff shall tender her resignation as director of Feinbrand Investments (Private) Limited, Utopia Fresh Exporters (Private) Limited, Capcon (Private) Limited, Red Maple Enterprises (Private) Limited, Entergon Enterprises (Private) Limited and De Lange Silica Minerals (Private) Limited within seven (7) days of this order or otherwise be deemed to have resigned at the expiration of the period contemplated by this clause, whichever occurs first.
6. Upon handing down of a judgment by this court on the remaining issues, and after fulfilment by the first defendant of his obligation to sign documents necessary to deliver the entire issued equity in Summerbreak Investments (Private) Limited, and Interfruit (Private) Limited to plaintiff, the plaintiff shall resign as a trustee and beneficiary of the Serai-Dale Trust, within seven days of the last occurrence.
7. First defendant shall collect the MG Vintage motor vehicle from Umwinsidale property within forty-five (45) calendar days of the granting of this order at his own cost, after making prior arrangements with the plaintiff.
8. Plaintiff shall collect the equipment and assets of Interfruit (Private) Limited from Utopia Farm within forty-five (45) calendar days of the granting of this order at her own cost, after making prior arrangements with the first defendant.
9. Should either party fail to sign any company documents or transfer documents within seven (7) working days of written request to do so, the sheriff or the Additional Sheriff, Harare, shall be authorised to sign in the defaulting party's stead.
10. Where this order enjoins a party to transfer an asset to the other party or for one or more of the parties to receive transfer of ownership of an asset, then the costs of such transfer shall be borne by the party in whose favour the transfer is to be made. In respect of the Nyanga Property, the transfer shall be done by the plaintiff's attorneys, Atherstone and Cook.
11. Where this order enjoins a party to deliver a movable asset to the other, the delivery shall be done in the presence of the Sheriff of the High Court at cost to the party in whose favour the delivery is to be made, who shall render an inventory of such goods.
12. In respect of Utopia Power Company Limited, the plaintiff and first defendant shall tender their resignations or be deemed to have resigned therefrom, within seven (7) days of this order.

13. The plaintiff and first defendant shall not sell, dispose, or otherwise dissipate their rights, title and interests in Mosspatch Investments (Private) Limited and Zororo Energy Company Limited pending the judgment of this court in HC 9611/18.
14. Each party shall bear its own costs in this matter."

After this very intricate order in which the parties apportioned the greater part of their assets and companies, three issues remained to be resolved. These are they:

1. What portion of the assets in Mosspatch Investments (Private) Limited constitute an asset of the parties and what is the equitable distribution of either shares or the land namely Randhurst Grange Estate situated in the district of Goromonzi measuring 926.5639 hectares under Deed of Transfer No. 4129/10 dated September 2010, registered in the name of Mosspatch Investments (Private) Limited.
2. Whether shares in Zororo Energy Company Limited constitute an asset of the parties? What is the appropriate distribution thereof?
3. Whether the plaintiff misappropriated USD 2.3 million dollars from Interfruit (Private) Limited and failed to account for same?

I deal with these issues, in turn, below, without necessarily following the order in which they are set out above.

1. Whether shares in Zororo Energy Company Limited constitute an asset of the parties? What is the appropriate distribution thereof?

The plaintiff's case.

The plaintiff gave evidence and stated that Zororo Energy Company Limited has two directors and two shareholders being the first defendant and herself, each with 50% shareholding. She wants the court to grant each of them, their 50% shareholding. She refuted the first defendant's claim that only the 50% he owns is up for distribution and plaintiff does not own any shares in Zororo Energy Company Limited. In elaboration, she averred that they started to work on the Zororo Energy Solar Project beginning of 2018 and employed resources from their businesses to develop all the work relating to licensing. The company is said to have been formally registered in September 2018 through Agrilink which had been doing all company registrations for them since 2002, which time coincided with when the first defendant is alleged to have deserted the matrimonial home taking with him all the company documents and title deeds of all properties. In the ensuing period, the first defendant is alleged to have started concealing information from the plaintiff. The plaintiff says she kept on checking the

status of Zororo Energy Company Limited and her legal practitioners came across an advertisement in the Herald when an application to ZERA was flighted. Plaintiff says she then visited ZERA and checked and saw that the application forms still reflected the first defendant and herself as the directors and shareholders.

According to the plaintiff, the first defendant and his mistress, the second defendant, must have forged documents at the company registry to alter the directorship and shareholding of the company to reflect first and second defendants as the directors and shareholders with 50% shareholding each. In October 2020, the first defendant is said to have then submitted these forged papers to ZERA. Faced with the two sets of papers, ZERA is said to have instructed *Sawyer and Mkushi* Legal Practitioners to carry out an investigation and establish which set was authentic. A Commission of Inquiry was set up by the Registrar of Companies and investigations were done with the outcome that the plaintiff and first defendant were found to be the authentic directors and shareholders of Zororo Energy Company.

Furthermore, the plaintiff indicated that there is a pending criminal matter against the first and second respondents where they are facing charges of forgery and fraud.

The plaintiff was cross examined on the signatures for the Zororo Energy Company Limited Memorandum and Articles of Association on page 89 of the plaintiff's bundle of documents. She confirmed that the signature for the first defendant is not like his usual signature which appears on page 91. She was then quizzed to say that these documents cannot therefore be the original documents for Zororo Energy Company Limited because of the inconsistency in the signatures. The plaintiff said that when the company was finally registered, the first defendant took original copies from Agrilink before she had sight of them and refused to share them. When asked to contrast the Zororo Energy Company Limited documents in her bundle and those in the first defendant's bundle on page 66, the plaintiff explained that the documents tendered by the first defendant are a result of the alleged forgery perpetrated by the first and second defendants which documents they then got certified as true copies of the originals based on the fraudulent documents. The certifying officers are said to have had no knowledge that the file had been tampered with. She said the court should rely on the findings of the Commission of Inquiry of June 2021 which appears on page 129 of Volume 1 of the Plaintiff's bundle of documents.

The first defendant's case

The first defendant gave evidence and said that the true set of documents for Zororo Energy Company Limited are as appear on from pages 112 to 116 of his bundle of documents which reflect that the directors and shareholders are him and second defendant. He explained that his documents are the authentic ones as they are certified as true copies by the custodian of company documents under the Companies and other Entities Act. He further averred that the documents have both his and second defendant's signatures and they match the hard copies in his possession. The set of documents submitted by the plaintiff are said not to have his own signature and are therefore not authentic.

Furthermore, the first defendant testified that Zororo Energy Company Limited was registered on 17 September 2018 which was 30 days before he received summons for divorce from the plaintiff. It was averred that during the tenure of the marriage, Zororo Energy Company Limited was a shelf company and even on the 26th of November 2019 when the divorce was granted. The company was said to have been the brainchild of the first defendant and his other partners who have invested a lot of personal resources and money into it. The plaintiff is alleged not to have made any input in the naming or registration of any of the company's activities.

The first defendant confirmed that he is aware of the Commission of Inquiry and had participated in the investigations. He however professed ignorance of the outcome of same and said that all he received was notification for them to regularise the company documents. When asked whether the outcome of the Commission of Inquiry had been set aside by an application for review, the first defendant said no such application had been filed and the recommendations had been unclear, so they simply reverted to the documents impugned by the Commission of Inquiry. He prayed that the plaintiff's claim on Zororo Energy Company Limited, be dismissed.

Analysis of Evidence and Findings

The Zororo Energy Company Limited issue is resolved by a finding of who the authentic directors and shareholders of the company are. It is common cause that there was a Commission of Inquiry on this issue which was set up in terms of s 41 of the Companies and Other Business Entities Act, [*Chapter 24:31*]. The full report including the record of the proceedings appears on pages 129 to 141 of the plaintiff's bundle of documents. It shows that the plaintiff and first defendant, examiners from the company registry, a legal practitioner who worked with Agrilink, an Agrilink employee gave evidence.

I can do no better than reproduce the letter from the Acting Chief Registrar of Companies which was addressed to the first defendant's legal practitioners of record, at the conclusion of the investigation which is dated 30 September 2021.

"REF: ZERA: CERTIFICATION OF ZORORO ENERGY COMPANY LIMITED DOCUMENTS NO 11402/18: REQUEST FOR ASSESSMENT OF AUTHENTICITY

Reference is made to the above-mentioned matter.

As previously communicated in our letter dated 6 September 2021, we investigated the anomalies that arose out of the registration of Zororo Energy Company Limited.

An investigation committee was set up by the Acting Chief Registrar. The committee reviewed the company documents in question, as well as interviewed Mr. Michael Shongwe Ndoro, Precious Ndoro. Mr Zimbodza (legal practitioner); Tapiwa Chizikani (manager at Agrilink Accounting Services and 4 employees from the department.

THE SALIENT FACTS OF THE INVESTIGATION:

- It is impossible for 2 examiners to simultaneously register the same company.
- The examiner purported to have examined and registered Zororo Energy Company Limited with Michael Shongwe Ndoro and Mukahanana denies examining the documents in question.
- The examiner who registered Zororo Energy Company Limited with Michael Shongwe Ndoro and Precious Ndoro as directors and shareholders confirms examining and registering the company, which is also corroborated by the internal data capturing system.
- The receipt endorsed on CR12, CR13 and CR14 with Ex 11(with Michael Ndoro and Tunika Mukahanana as directors and shareholders) was receipted on 29 February 2019 when the company was already registered.

FINDINGS

- It was found that the documents bearing Ex 11 stamp could have originated from elsewhere considering the inconsistencies in receipts, stamps and the controversy surrounding the signature of the examiner.
- Concerning the documents with Michael Shongwe Ndoro and Tunika Mukahanana as directors and shareholders, no examiner confirmed processing the documents or the signature affixed thereto with.
- The set of documents with Michael Shongwe Ndoro and Precious Ndoro (as directors and shareholders) processed and examined using stamp Ex 07 and also reflected in the system is the correct and authentic record.

RECOMMENDATIONS

Zororo Energy Company Limited should regularise its registration with the Registrar of Companies to reflect Michael Shongwe Ndoro and Precious Ndoro as both shareholders and directors as from the initial registration."

It is clear from the record that the first defendant was not truthful in saying he was not aware of the outcome of the Commission of Inquiry. The letter above proves so as does a letter from ZERA dated 15 November 2021 which was addressed to the Chief Executive Officer of Zororo Energy Company Limited and marked to the attention of the plaintiff. (See p 142 of plaintiff's bundle of documents). It is also not true that the recommendations of the Commission of Inquiry are vague and unclear. They clearly speak for themselves in indicating that regularisation of Zororo Energy Company Limited registration with the Registrar of Companies means reflecting the plaintiff and first defendant as both shareholders and directors as from the initial registration.

As a result of the recommendations of the Commission of Inquiry, the first and second defendants were charged with fraud and forgery, a case which was said to be pending in evidence before me.

On this issue, the plaintiff gave her evidence well and graciously admitted that the first defendant's signature in the papers she had, was unlike his usual signature whilst hers was close to her usual one. She offered a plausible explanation that the first defendant had collected all the original documents relating to the company registration, a fact confirmed by Agrilink in the Commission of Inquiry proceedings. On the other hand, the first defendant was untruthful in claiming he had no knowledge of the outcome of the inquiry. Given the outcome of the inquiry, it is highly likely that the first defendant tampered with the documents relating to registration of Zororo Energy Company Limited and plaintiff had only the unauthentic documents to work with.

It is argued for the first defendant that the claim for 50% of Zororo Energy Company is baseless as the plaintiff failed to show how she acquired the shareholding she claims. The company was said not to form part of the assets of the spouses and is therefore not subject to distribution. The only valid documentation for the company was said to be that from first defendant which he says he has regularised, as requested by the Registrar of Companies.

On the authority of the case of *Haixi* v *Wenzou Enterprises (Pvt) Limited* HH 613/13 and *Mhandu* v *Mushore & Ors* HH 80/11, it was contended that there is a presumption of validity of government documents which are regular on their face until lawfully invalidated, impugned or set aside.

Are the findings of the Commission of Inquiry not a proper form of impugning the first respondent's documents and declaring them null and void?

The function of investigation is statutorily provided in s 41 of the Companies and Other Entities Act as follows:

"41 Investigation to determine ownership or control:
(1) The Registrar may, with or without a request from members of the registered business entity concerned, assign one or more inspectors to investigate and report on the shareholding of a company, the interests of a private business corporation and other matters, to determine the persons who are or have been financially interested in the success or failure of the entity or are able to control or materially influence the entity's policies."

Further, the Act provides in s 51 that such a report can be used as evidence in any legal proceedings as follows:

"Report following investigation to be evidence:
A copy of any report of any inspector assigned under this Part shall be admissible in any legal proceedings as evidence."

In terms of s 26 of the High Court Act, [*Chapter 7:06*], the High Court has power, jurisdiction, and authority to review all proceedings and decisions of all inferior courts of justice, tribunals, and administrative authorities within Zimbabwe.

The first defendant's gripe that the Commission of Inquiry did not interview all relevant people can not be resolved before me. Their findings are admissible as evidence and the first defendant admitted he has not applied to have the decision set aside. What this means is that the decision remains extant until it is set aside by a court or body of competent jurisdiction.

The presumption of regularity of government documents does not assist the first defendant as in fact, there is a determination of a government body, which acted statutorily and rebutted that presumption by finding that the documents on file were a result of fraud and forgery. I have no legal basis to depart from their findings which are based on extensive investigations which found that the set of documents with Michael Shongwe Ndoro and Precious Ndoro (as directors and shareholders) processed and examined using stamp Ex 07 and reflected in the system is the correct and authentic record. The company is owned in equal and undivided shares between plaintiff and first defendant. The first defendant cannot be obstinate and just elect to ignore the findings and recommendations of the Commission of Inquiry and hope to benefit therefrom. The determination remains extant. That ends the matter.

It is not equitable to take one spouse's share and give it to the other without a solid ground for doing so. See *Kanoyangwa* v *Kanoyangwa* 2011 (1) ZLR 90 (H), *Lafontant* v *Kennedy* 2000 (2) ZLR 280 (S) and *Pangeti* v *Nyagumbo* HH 35/2015

Accordingly, it is my finding that the plaintiff has managed to prove her claim to 50% shareholding of Zororo Energy Company Limited. The order prayed for is upheld, therefore.

2. Whether the plaintiff misappropriated USD 2.3 million dollars from Interfruit (Private) Limited and failed to account for same?

The first defendant's case:

In his evidence, the first defendant averred that the plaintiff admits in her own evidence that she took money belonging to Interfresh Private Limited, a trust company. He said the theft of USD 2.3/2.7 million was discovered after a review of the bank statements and the conducting of an independent audit. The audit was allegedly commissioned by the first defendant in his capacity as the managing director and shareholder in Interfruit (Private) Limited as well as donor and trustee in the Serai-Dale Trust. The first defendant stated that between 2018 and beginning of 2019, he had written to the plaintiff and her legal practitioners requesting an explanation on money transferred to her personal account from the trust company, but she had refused to provide an explanation. He said he could not do the audit earlier as he had no money.

The first defendant denied having acted in defiance of an order by Honourable MUREMBA J which had ordered that a forensic audit be conducted covering the affairs of all the companies of the first defendant and the plaintiff. His explanation for commissioning the independent audit is that he had reported the plaintiff for the alleged embezzlement of funds to CID Serious crime Department in April 2019 and the prosecutor had requested an independent audit on 18 May 2022. The MUREMBA J order is said to have related to a separate matter. The audit was commissioned on 25 January 2022.

The court was referred to page 192 of the first defendant's bundle of documents being a letter to the Ecobank Account Manager advising him of the abuse of the business account by the plaintiff and directing him on how the account should be operated. Such action is alleged to have been motivated by the above normal withdrawals of the plaintiff directed into her personal account. Further reference was made to page 556 of the plaintiff's bundle of documents Volume 2, where an entry reflects that the plaintiff withdrew USD 2 311 290.36 from Interfruit account held with Standard Chartered Bank. On page 559 of the same bundle is a summary of withdrawals and credits from Utopia Fresh Exporters Private Limited which shows that plaintiff withdrew USD 91 570 and on page 560 a withdrawal of USD 169 7000.75.

Under cross examination, the first defendant conceded that he had not asked for discovery of the plaintiff's account. He accepted that the audit report does not say anything about embezzlement of funds nor mention any criminal proceedings. He accepted too that there are no books of accounts of Interfruit (Private) Limited produced by the managing director or the Trust nor evidence on the gross revenue or profits for the relevant period.

It was argued by the first defendant that as there is no explanation on the withdrawals, the only conclusion is that she benefitted solely and that the whole amount should be considered as part of her distribution accrual in this matter.

The plaintiff's case:

The plaintiff denied having misappropriated USD 2.7 million or USD 2.3 million. She testified that from 2013, the first defendant closed Interfresh to pursue farming full time. She claims to have then gone into the Interfresh factory to resuscitate it at which point there were no finished products, no raw materials nor cash in the bank. At that point, she says she closed her maputi business and grew the Interfruit business and took over all financial responsibilities including for the whole family covering the fees for the children, medical expenses, and household expenses. She claims to have also stepped in to assist the first defendant in his farming operations when lenders refused to fund him.

The reports of embezzlement are alleged to be false and malicious, particularly considering their timing as they came after the institution of divorce proceedings and the granting of a protection order for the plaintiff against the first defendant on 8 March 2019 and an assault conviction of the 25 March 2019 (see p 402 of the plaintiff's bundle of documents). Further, the police report is said to have been filed some four months after the parties had reached an agreement on how to run the businesses pending finalisation of the divorce matter.

The plaintiff questioned why after the criminal report in April 2019, the audit was only conducted some two years later. Queried too was why, if the prosecutor requested the audit on 18 May 2022 it was commissioned on 25 January 2022. The audit is impugned too for having been done unilaterally by the first defendant without any board resolution.

All the report is said to establish is that the plaintiff withdrew certain amounts without concluding that there was embezzlement of funds. Another shortcoming pointed to is that the plaintiff was not interviewed and is allegedly only based on the bank statement. She says she did not receive any communication to comment on the audit. Further, the audit is said to have only focused on Interfruit and not the company the first defendant was running.

Whilst accepting the withdrawals pointed to, the plaintiff said that all this showed was that she was actively generating the family income and running the business. The reason she wanted a forensic audit was to explain the movement of money and the first defendant is said to have resisted this and ingeniously done a unilateral appointment of Global Village auditors in January 2022 yet there was an extant order by MUREMBA J ordering that forensic auditor be appointed by the Master of the High Court.

The plaintiff prayed that the court should dismiss the claims of embezzlement of funds as these are lies maliciously raised and designed to deny the plaintiff her fair and just share in the distribution of assets of the spouses.

Analysis of Evidence and Findings

The facts of this matter must be considered wholistically. The plaintiff and first defendant signed an interim arrangements agreement on 16 October 2018. They agreed that they would separately run the two companies. Plaintiff would run Interfruit (Private) Limited whilst the first defendant would run Utopia Farm (Private) Limited. It cannot be coincidental that upon the first respondent's conviction on a charge of assaulting the plaintiff on 25 March 2019 and the granting of a protection order earlier on 8 March 2019, the first defendant then made a report against the plaintiff in April 2019 alleging the misappropriation or theft of US$2.7 million. This action seems to have been spurred by the first respondent's need to retaliate in the vicious fall out between the parties. This is particularly so if regard is had to an order by MUREMBA J which was granted on 14 May 2019 ordering that there be a forensic audit process supervised by the Master of all the parties' assets.

The first defendant did not subject himself to this process and pleads lack of money. If indeed such a huge amount of money had been stolen and he wanted proof beyond reasonable doubt, would he not have grabbed this opportunity with both hands? Despite the High Court order being extant, the first defendant waited until January 2022 to commission his own independent audit through Global Village auditors.

The shortcomings of the audit commissioned by the first defendant are evident if contrasted with what the forensic audit would have established. Though the plaintiff says this audit was done at the request of the prosecutor for the criminal matter against the plaintiff, nothing in the report says so. Further, if the report was made in April 2019, why wait till January 2022 to do the audit report. The plaintiff was not a party to the audit as she was not interviewed nor was, she given an opportunity to comment on it. All the report does is show that there was money withdrawn from the relevant accounts as it was just an analysis of the bank accounts. It does not show how the money was misused.

It is important to reproduce the terms of the order by MUREMBA J in case HC 11817/19 which was issued on the 14th of May 2019 in a case in which the plaintiff was the applicant, and the first defendant was respondent. It went as follows:

"IT IS ORDERED THAT:

1. The respondent be and is hereby interdicted from the applicant's operations at Interfruit (Pvt) Limited.
2. The respondent be and is hereby interdicted from withdrawing money from the bank accounts of Interfruit (Pvt) Limited.
3. The firm of accountants KPMG or if they are unable to do so, any other suitable firm of accountants appointed by the Master of the High Court, be and is hereby appointed to carry out forensic audit of the parties' assets, liabilities, and receivables in terms of the mandate attached to the founding affidavit as annexure.
4. The parties shall comply with their obligations as set out in the mandate of the auditors.
5. The respondent be and is hereby ordered to give the applicant keys to the safe within 2 hours of the grant hereof failing which the applicant shall be entitled to engage the services of a locksmith to open the safe.
6. The respondent be and is hereby interdicted from visiting 19B Wayhill Lane east, Umwinsidale, Harare.
7. The respondent shall pay the costs of this application."

It is clear from paragraph 1 of the above order that the first respondent was under an interdict barring him from interfering with the plaintiff's operations at Interfruit (Pvt) Limited when he commissioned an audit of Interfruit (Pvt) Limited by Global Village auditors. It had been alleged that he was also withdrawing money from Interfruit hence paragraph 2 of the order above. Even the interim arrangement agreement had the same effect of barring the first defendant from interfering with Interfruit operations.

Given the extant order and its effect, is the audit valid? I think not. The law is clear that a thing done contrary to the direct prohibition of a court order is void and of no legal effect. See the case of *Sithole* v *Sithole* HH 139/18 wherein it was held as follows:

"It is trite law that a thing done contrary to the direct prohibition of a court order is void and is of no legal effect. Such a thing is regarded as never having been done."

It is my considered view therefore that the audit report from Global Village auditors is of no legal force. Even if one were to consider it, I have already pointed to its shortcomings above. Furthermore, the first defendant accepted that he had no board authority to commission the audit by Global Village. He said he was acting in his capacity as managing director of Interfruit Private Limited. What he should have done is set out in *Madzivire & Ors* v *Zvarivadza & Ors* 2006 (1) ZLR 514 (S). It was held that:

> "The fact that a person is a managing director of a company does not clothe him with authority to sue on behalf of a company in the absence of a resolution authorising him to do so. The general rule is that directors of a company can only act validly when assembled at a board meeting. An exception to this rule is where a company has only one director who can perform all judicial acts without holding a full meeting."

In *casu* there were two directors for Interfruit (Private) Limited. The first defendant needed a board resolution to act as he did. This too, would only have worked if the MUREMBA J interdict was not in existence.

It was argued for the first defendant that the plaintiff misappropriated USD 2.3 million because she admitted that the money went into her account. Misappropriation means the act of stealing something that you have been trusted to take care of and using it for yourself. One necessarily needs to prove that the money was used for the plaintiff's benefit. The first defendant fell short of proving that by refusing to participate in the forensic audit as ordered by the court. He also did not seek to discover the plaintiff's bank account. The Global Village audit report tells an incomplete story without the plaintiff's input. The first defendant's contention that the court should look at the legal implication of the misappropriation of USD 2.3 million suffers a still birth as the misappropriation has not been established. The court cannot therefore take this a factor to reduce the amount due to the plaintiff. The case of *Denhere* v *Denhere* SC 51/17 which cites the case of *Baker* v *Baker* [1995] 2 FLR 829 (CA), with approval is therefore not applicable. It was argued in that case that the plaintiff had embarked on asset stripping of the matrimonial estate. The evidence was clear on the asset stripping as the following was found established:

> "Whilst the respondent brought everything into the joint estate, the appellant would purchase assets without the knowledge of the respondent. On his own evidence he also disposed of vehicles behind her back and never accounted for the proceeds."

This is unlike, in *casu* where the plaintiff says the money was withdrawn for household, business and the children's maintenance. In his own evidence in chief, the first respondent confirmed this when he was commenting on plaintiff's assertion that she was solely burdened with fees payment. He said:

"That is not true. Plaintiff by her own admission was working as executive director of Interfruit. Shareholding belonged to Serai-Dale where plaintiff, me and our children, third and fourth defendants were beneficiaries. All the money for family upkeep and children's fees came out of Interfruit or Utopia. Both belong to the trust. There was never a day when either me or plaintiff used other resources outside Trust companies."

The parties had also agreed to run the businesses independent of each other.

In Becks's *Theory and Principles of Pleadings in Civil Actions*, 6th Ed at p 125 it is stated as follows:

> "In certain cases, greater precision is required than in others, and this is always so whenever any charge is made against an opponent, more especially a serious charge like fraud. Where fraud is relied on, the circumstances which reveal the fraud must be set out. It is not sufficient

> merely to allege that a transaction, which in the ordinary way would be a proper one, was fraudulent."

Could one conclude, without a forensic audit report, that the mere withdrawal of a large amount points to misappropriation of funds. There is indeed no clear evidence that the money was misappropriated by the plaintiff. The Global Village audit report does not reach that conclusion. It makes no astounding finding except what the plaintiff already admits that she withdrew those amounts. One, cannot dispel her assertion that this only goes to show that she was involved in the generation of the family income and meeting family and other business expenses. Her comments and participation should have been requested on the audit report to have the complete picture.

Interestingly, despite pleading lack of money, the first defendant, at his own convenience was able to commission an audit which he obviously paid for.

I started off by saying this issue should be considered wholistically hence the order requesting a forensic audit of all the assets of the parties which the first defendant has avoided to date. Had that been done, then the court would have been placed in the position to assess whether this alleged amount should accrue to the plaintiff in the division of the properties of the parties. The court would also be able to assess, similarly what has accrued to the first defendant. It would be unsafe, without legal basis, and unjust to find that the plaintiff misappropriated USD 2.7 million or 2.3 million, in the circumstances. I am therefore dismissing the first defendant's contention that the plaintiff misappropriated USD 2.7 or 2.3 million.

What portion of the assets in Mosspatch Investments (Private) Limited constitute an asset of the parties?

Plaintiff's case

The plaintiff gave evidence that it is common cause that 66% of the shares of Mosspatch Investments (Private) Limited are owned Serai- Dale Trust whilst 34% shares are held by the first defendant. She contends that all the shares constitute an asset of the parties which is up for distribution. This is because the parties have already shared the assets of the Trust in the order granted by consent on 21 March 2023. That order by consent is said to signal the first defendant's abandonment of his argument that the parties are not the beneficial owners of the assets registered under the Trust. Further, the first defendant's own claim for the 66% shares held by the Trust is alleged to buttress that the Trust is a mere front for the assets of the parties.

It is argued that Mosspatch Investments (Private) Limited itself is a non-trading company whose sole purpose is to act as a vehicle through which the parties own the farm known as Machipisa Farm and the court should look at this as an asset of the parties.

The plaintiff testified that the farm in issue was bought through Mosspatch Investments (Private) Limited and the money for the purchase was borrowed from the Mukombachotos and they signed for the debt in their personal names. The debt is said to have been partly cleared by ceding the parties' property in South Africa.

First Defendant's Case

The first defendant confirmed the shareholding in Mosspatch Investments (Private) Limited as set out by the plaintiff. Under cross examination, he conceded that they have already shared some Trust assets and that the Trust was used as a conduit for ownership of assets by the parties. He accepted that though the trust deed provided for three members, it does not have three members now. He agreed that the Trust does not have a bank account and when he sold the land in Marondera, there was no Trust bank account into which payment was made. Accepted too was the averment that the parties have not paid any value to the Trust for use and enjoyment of Trust property.

The first defendant stated that he is the one who bought assets including the farm in issue and donated to the Trust the 66% shareholding whilst retaining 34%.

Analysis and Findings

It is clear from the evidence of both parties that they are the beneficial owners of the 66% shares held by the Trust. The case of *Gonye* v *Gonye* 1994 (2) ZLR 103 (SC) buttresses the fact that Mosspatch Investments (Private) Limited and in turn the farm held by it, is an asset of the parties. It was held therein as follows:

> "The concept "the assets of the spouses" is clearly intended to have assets owned by the spouses individually (his or hers) or jointly (theirs) at the time of the dissolution of the marriage by the court considered when an order is made with regard to the division, apportionment or distribution of such assets."

It is therefore irrelevant, who contributed what to the purchase of the farm in resolving the question whether 100% of the assets of Mosspatch Investments (Private) Limited constitutes an asset of the parties. There is only one conclusion which is supported by the law. It is that 100% of the assets of Mosspatch Investments (Private) Limited constitute an asset of the parties.

What is the equitable distribution of either shares or the land namely Randhurst Grange Estate situated in the district of Goromonzi measuring 926.5639 hectares under Deed of Transfer No. 4129/10 dated September 2010, registered in the name of Mosspatch Investments (Private) Limited?

Plaintiff's case

The plaintiff is asking the court to share the land held in the name of Mosspatch Investments (Private) Limited (Also known as Machipisa Farm) to achieve equity. She states that the order granted by consent of 21 March 2023 has left her shortchanged to the amount of USD 2.2 million if regard is had to the award of the Umwinsdale property and Nyanga property to her and the Utopia Farm and Marondera property awarded to the first defendant. Her assessment is based on the valuations of the assets of the parties which were done by Homelux on 1 September 2018 as appearing on pages 189 to 211 of the plaintiff's bundle of documents, Volume 1.

The plaintiff proposes that the farm should be sub divided and she gets 777 hectares whilst plaintiff gets 155 hectares. A professional opinion was sought from a qualified surveyor and is relied on in support of an order for subdivision. (See p 212 of plaintiff's bundle of documents).

In support of an order of subdivision, the plaintiff says this will provide a clean break for the parties. She says too, she needs to reassemble the factory equipment and revive the Interfruit factory which has been closed for the last four years by the first defendant. It her evidence that she has no savings and has been surviving by renting rooms in the matrimonial home. She does not sit on any boards which are paying her and volunteers on the boards she sits on. Though her two children are now majors, she says she has had to borrow money for their fees.

The plaintiff acknowledged the existence of historical debts such as the ZIMRA one from 2010, the Mukombachoto one, Tetrad and Interfin and said they had all largely been cleared using the farm rental by the first defendant as they were revalued at 1:1.

Speaking to her qualifications, the plaintiff said that she is a sociology graduate from the University of Zimbabwe who had worked at a manufacturing company first, then as a lecturer at Mutare Technical College. In 1996 she operated a curio shop at Quality International Hotel and had an apparel printing business under Ethnic Design. Upon relocation to South Africa in December 1997 when first defendant got a job there, she says she continued to run

her businesses. In 2013 she took over management of Interfruit and both were directors on their many companies. Whilst accepting that the first defendant worked for the family and contributed financially to the acquisition of assets, the plaintiff said that they worked together as husband and wife in building up the estate they held.

The plaintiff gave her evidence well and was unshaken under cross examination. Her assertions are supported by documentary evidence such as the Homelux Valuation report and the Land Surveyor's report. She gave credit to the first defendant where it was due. I found her to be a credible witness.

The first defendant's case

The first defendant is asking the court to award all 100% of the farm to him on the basis that the plaintiff never disputed the shareholding of Mosspatch Investments (Private Limited. He also says that the plaintiff is not interested in farming and her main interest is Interfruit (Private) Limited which she already got through the order by consent. The other point given is that Utopia Farm and the farm in issue are a single economic unit as the equipment, irrigation and pumphouse are located on Utopia Farm and the major fields are capacitated with one centre pivot located in Machipisa farm getting water from Utopia farm. Subdivision of Machipisa farm was alleged to lead to both farms becoming sub economical in production. He claimed that he resides on this farm and his future income would come if the combined farms were wholly awarded to him. According to the plaintiff, any subdivision would interfere with his ability to continue life and would not provide a clean break.

The Homelux Valuation report was dismissed as not a true reflection of the actual values of the properties. He claimed that the parties had agreed to undervalue farm assets for their intended audience as the report was intended to be used for a loan facility application. The court was asked to disregard the valuation report even though the first defendant had produced it in his bundle of documents. He says its sole purpose was to enumerate the physical assets of the parties.

The first defendant who is now 58 years old stated that he is not allowed to borrow beyond 60 years in his personal capacity and gave an example of when he was 57 years and failed to get an overdraft because of no stable income to support the facility, going forward.

It is the first respondent's desire to live the life he was accustomed to, five years ago and so he wants the assets in order to re-establish himself.

The first respondent claims to have cleared some historical debts as follows:

i. Interfin settled debt of USD 500 000.00.

ii. Tetrad settled debt of USD 500 000.00.
iii. Mukombachoto USD 1.2 million settled through assets in South Africa and disposal of Machipisa property.
iv. Sedco settled debt of USD 300 000.00.
v. Clive and Jane Banns USD 325 000.00 still outstanding. These are his teacher and headmaster in high school.
vi. William Baine USD 50 000.00.

It is the first defendant's evidence that their contributions in the marriage were not the same and he claims that he disproportionately contributed to acquiring and protecting the assets.

The first respondent does not care about where and how the plaintiff re-establishes Interfruit. He believes that the plaintiff claim is only aimed at destroying and harassing him.

In giving evidence, the first respondent denied that there was any adultery between him and the second respondent despite there being an order where the second defendant consented to judgment in favour of the plaintiff. He also said the plaintiff had made allegations of fraud and forgery which had tarnished his reputation. There is a Commission of Inquiry report by the Registrar of Companies which recommended an investigation for fraud and forgery. He also denied that there was any domestic violence terming it an allegation but the record shows that he was convicted of assault.

The first defendant continues this path when he impugns the Homelux Valuation report claiming that it has exaggerated values on some assets, particularly that they undervalued some farm assets as they wanted to use it for application for a loan facility. He failed to name the institution where the report was directed to. He failed to point to any counter evaluation report and his explanation that he produced it in evidence simply to enumerate the physical assets of the parties, is unsatisfactory given that there are title deeds on record to better enumerate the assets. The Homelux report itself does not say that it was meant for a loan application. If one considers that the report is dated 1 September 2018 and that summons were issued out on 18 October 2018, with parties already considering divorce and division of matrimonial property in August 2018 (see e mails on pages 360 to 364 of the plaintiff's bundle of documents, volume 2), the first defendant's version is shaken.

Under cross examination, the first respondent clarified that he does not reside on Machipisa farm but at Utopia Farm. A subdivision of Machipisa Farm will therefore not affect his living arrangements.

Though the first defendant was served with the Land Surveyor's report on subdivision of Machipisa farm on 28 February 2023, he did not relate to it in his evidence. He simply alleged that the two farms are indivisible without any expert evidence to counter the plaintiff's evidence. He simply does not want the plaintiff anywhere near him and says that she simply wants to harass him.

Despite the first defendant claiming to have settled the historical debts running into close to USD 2.5 million, there is no evidence on record of these having been settled in the manner he claims to have done. How difficult was it to show proof of payment of these millions of United States dollars? If there are any historical debts properly shown to be still outstanding, then the lenders can follow the legal channels against the parties.

The first defendant's evidence was riddled with clear untruths which were largely unnecessary as the record speaks for itself. He seems to have been making up his evidence as he went along especially on the Homelux Valuation report and on the indivisibility of Machipisa farm. He seems to be labouring under an improper understanding of what the law considers in distributing assets between parties. The first defendant was largely an incredible witness given the falsities relating to Zororo and Homelux, among others. His credibility is questionable.

Analysis of Evidence and Findings

Section 7 (1) of the Matrimonial Causes Act, [*Chapter 5:13*], provides that the court may make an order regarding the division, apportionment, or distribution of the assets of the spouses including an order that any asset be transferred from one spouse to the other. The rights claimed by the spouses under s 7 (1) are dependent upon the exercise by the court of broad discretion. In giving effect to the broad discretion bestowed on it by s 7 (1) of the Act, the court must have regard to the factors set out in s 7 (4) which are:

> "(a) the income-earning capacity, assets, and other financial resources which each spouse and child has or is likely to have in the foreseeable future.
> (b) the financial needs, obligations, and responsibilities which each spouse and child has or is likely to have in the foreseeable future.
> (c) the standard of living of the family, including the manner in which any child was being educated or trained or expected to be educated or trained.
> (d) the age and physical and mental condition of each spouse and child.

(e) the direct or indirect contribution made by each spouse to the family, including contributions made by looking after the home and caring for the family and any other domestic duties.
(f) the value to either of the spouses or to any child of any benefit, including a pension or gratuity, which such spouse or child will lose as a result of the dissolution of the marriage.
(g) the duration of the marriage.

and in so doing the court shall endeavor as far as is reasonable and practicable and, having regard to their conduct, is just to do so, to place the spouses and children in the position they would have been in had a normal marriage relationship continued between the spouses."

In this case, I am not starting on a clean slate to try and achieve a fair and equitable distribution of the assets of the parties. They have already distributed the bulk of the assets through the order granted by consent. I necessarily need to start off by considering the position of the parties after such distribution. The Homelux Valuation report comes in handy. It is the only valuation report and seems to me to have been prepared in anticipation of the divorce and division of property. This is evident from email correspondence between the parties starting from August 15, 2018, which appears on pages 359 to 364 of the plaintiff's bundle of documents Volume 2. The plaintiff said, "the reason we need professional assistance on valuation of assets and business is to avoid thumb sucking so that we have fair and equitable distribution of assets and liabilities."

The valuation for the properties in existence which appears on page 208 of the first respondent's bundle of documents shows that the first respondent got allocated the Utopia Farm which is valued at USD 4 million and stand 348 Marandellas Township valued at USD 80 000.00 whilst the plaintiff got the Umwinsdale home valued at USD 1.8 million and the Nyanga property valued at USD 140 000.00. There appears to be a difference of USD 2 140 000.00 in favour of the first defendant. Machipisa farm is valued USD 3.3 million. There is a clear need to achieve a fair and equitable distribution through the order of distribution of the Machipisa farm by considering the relevant factors set out above.

I already found that there is no evidence of misappropriation of USD 2.3 million. This will therefore not be considered as having already accrued to the plaintiff. The clearance of historical debts has not been proved to have been done as alleged by the first defendant. Though he claimed that there was evidence in his bundle of documents, I was not pointed to any such documentary evidence. My perusal of the bundle did not lead me to any such evidence. I am inclined to believe that the parties benefitted from the legal changes which revalued debts owed in USD to the Zimbabwean dollar currency. The Mukombachoto debt seems to have been largely paid off using assets of the parties in South Africa (as testified by both parties) and disposal of part of the farm here. On record page 193 of the first defendant's bundle of documents is a court order in which the plaintiff and first defendant were granted a dismissal of an action filed under HC 10860/13 in which the Mkombachotos were the plaintiffs. It was dismissed for want of prosecution. The only letter on record is that from Seedco on page 191 of the same bundle. All it says is that the first defendant has cleared his grower debts. It does

not speak to any amount and how it was cleared. It is my considered opinion therefore, that the first defendant can not use the alleged payment of debts to his advantage.

Regarding the income earning capacity of the parties in the future, the plaintiff's evidence is that in the future she will need land to re-establish Interfruit, whose entire shareholding and equipment was awarded to her. Such equipment was previously at Utopia Farm which has been awarded to the first defendant. This is one of the reasons for requiring subdivision of Machipisa farm. There is an abattoir at the Umwinsdale property which is not operational now.

The first defendant intends to continue his business under Utopia Fresh Exporters (Private) Limited and the Utopia Farm has already been awarded to him. The first defendant also has shareholding in Phaenah Enterprises (Private) Limited in which he and second defendant are 50% shareholders.

The plaintiff does require land to resuscitate her income earning capacity as Interfruit was shut down some four years ago by the first defendant. The financial needs for the plaintiff relate largely to resuscitation of the business and university fees for the children who are in Canada whose fees plaintiff claims to have largely shouldered and even borrowed to attend to. There is however proof from the first defendant that in August 2021, he also paid fees for Dakarai Ndoro and for Lesedi Ndoro. There is however evidence of serious tussling to get this to happen, in email correspondence. I believe that this will continue to be a shared obligation. As far as is possible, the standard of living of the parties must be maintained, particularly the children's education in Canada.

The ages of the parties are not too far apart. The first defendant said that at 58 he is unable to secure and funding facilities in his personal capacity as he cannot borrow beyond 60 years of age and does not have stable income to support any facility going forward. The same would apply for the plaintiff who is only three years younger. The parties were married for about 27 years at the time of the divorce in 2019.

I move now to consider the contributions of the parties, both direct and indirect in the acquisition and maintenance of the assets of the parties. I start by considering how the companies and Trust were structured as an overview of how things used to be in the Ndoro family.

During happier years, the plaintiff and first defendant worked together to build an intricately woven group of companies in which the two of them were the directors. From pages 241 to 246 of the plaintiff's bundle of documents, the following emerges.

Number	Name of Entity	Shareholding/Beneficiaries	Directorship/Trustees
1	Mosspatch Investments Pvt Ltd	66 to Serai-Dale Trust 34 to First Defendant	Plaintiff & First Defendant
2	Summerbreak Investments Pvt Ltd	100 to Serai-Dale Trust	Plaintiff & First defendant
3	Red Maple Enterprises Pvt Ltd	50 to Serai-Dale Trust 50 to First Defendant	Plaintiff & First Defendant
4	Utopia Fresh Exporters Pvt Ltd	2 to Feinbrand Investments Pvt Ltd	Plaintiff & First Defendant
5	Feinbrand Investments Pvt Ltd	2 to Serai-Dale Trust	Plaintiff & First Defendant
6	Interfruit Pvt Ltd	2 to Feinbrand Investments Pvt Ltd	Plaintiff & First Defendant
7	Capcon Pvt Ltd	100% to Serai-Dale Trust	Plaintiff & First Defendant
8	Utopia Power Company Limited	25 to plaintiff 25 to N T Kaseke 50 to first defendant	Plaintiff & First Defendant & N T Kaseke
9	Entergon Investments Pvt Ltd	2 to Serai-Dale Trust	Plaintiff & First Defendant
10	De Lange-Silicia Minerals Pvt Ltd	2 to Serai-Dale Trust	Plaintiff & First Defendant
11	Business Continuity Services Pvt Ltd	No record	Plaintiff & First Defendant & S T Makore & R S Dhliwayo
12	Serai-Dale Trust	Beneficiaries are plaintiff, first, third and fourth defendants	Trustees for the time being, are plaintiff and first defendant

Everything was set up to benefit the plaintiff, first defendant and their two children who were the ultimate beneficiaries of Serai-Dale Trust which was established as a vehicle to hold the assets acquired by the companies.

It is accepted by the plaintiff that the first defendant was a high-flying executive who held executive posts in various companies during his illustrious career and worked to provide for the family. He says he purchased several of the companies single handedly and then invited the plaintiff to sit as a director. The plaintiff was a businesswoman and wife and mother too

and even ended up running Interfruit Private Limited and was director on several of the companies. Her indirect contributions are acknowledged by the first defendant.

Luckily for me, the law has already been settled on how to weigh the direct and indirect contributions of the parties. In *Usayi* v *Usayi* SC 11/03 the court opined on the valuation of indirect contributions as follows:

> "How can one quantify in monetary terms the contribution of a wife and mother who for 39 years faithfully performed her duties as wife, mother, counsellor, domestic worker, house keeper, day and night and nurse for her husband and children? How can one place a monetary value on the love, thoughtfulness and attention to detail that she puts into all the routine and sometimes boring duties attendant on keeping a household running smoothly and a husband and children happy? How can one measure in monetary terms the creation of a home and therein an atmosphere from which both husband and children can function to the best of their ability?"

In the *Usayi supra* case the Supreme Court upheld an award of 50% share of the immovable property to a woman who had made indirect contributions to the acquisition of the assets. The court dismissed the appellant's contention that he had acquired the property on his own and the respondent was not entitled to them. A similar approach was followed in *Mufanani* v *Mufanani* HH32/16 and in *Mhora* v *Mhora* SC 89/20.

Honourable TSANGA J wrote a seminal judgment on division of matrimonial property upon divorce in the light of international and regional instruments and the local law in the case of *Mhangami* v *Mhangami* HH 523/21. I can do no better than quote extensively from her:

"**THE LEGAL POSITION**

[12] Section 26 of our Constitution of Zimbabwe[1] deals with marriage. Therein, it espouses the principle of "equality of rights and obligations of spouses during marriage and at its dissolution". Section 56 also lays down equality and non-discrimination as fundamental rights. Discrimination is prohibited on grounds such as custom, culture, sex and gender among others. Furthermore, in interpreting the provisions on fundamental rights and freedoms, s 46 also requires the courts to take into account international law and all treaties and conventions to which Zimbabwe is a party. Zimbabwe is party to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Declaration of Human Rights; the Covenant of Civil and Political Rights; and the African Chartered on Human Rights and its Protocol on the rights of women. All these instruments contain provisions on men and women's status within the family. As such the principles out laid in these instruments with respect to marriage and family are crucial considerations in dissolution of marriage.

[13] On marriage, Article 16 (c) of CEDAW[2] for example stipulates equality in marriage and at its dissolution as a fundamental principle. Article 5 of CEDAW also requires States to actively address stereotypes on roles of both men and women that impede equality. As another example the Protocol to the African Charter on Human and People's Rights on the rights of women also requires State parties in its article V1, to ensure that women and men enjoy equal rights and are regarded **as equal partners** in marriage. The net effect is that there is bedrock of principles both constitutionally and from obligations under international treaties that are of relevance. As part of State machinery, courts are

[11] Amendment (No 20) Act 2013

[2] See Art 16 (1) (c) and (h) of CEDAW and also CEDAW General Recommendation No 21 on Equality in Marriage and Family Relations

therefore enjoined to ensure that the treatment of both men and women in law and in private life accords with the principles of equality and justice when it comes to marriage.
[14] In addition, the Matrimonial Causes Act [*Chapter 5:13*] in s 7(4) in particular, lays out the considerations that the courts must consider in the exercise of their discretion as to how property is to be distributed upon divorce. These include factors such as the income earning capacity of the spouses; financial needs, obligations and responsibilities; standard of living, age, physical and mental condition of each spouse; direct and indirect contributions, value of pensions and gratuities; and the duration of the marriage."

In *Shenje supra,* GILLESPIE J had this to say:

> "In deciding what is reasonable, practical and just in any division, the court is enjoined to have regard to all the circumstances of the case. A number of the more important, and more usual, circumstances are listed in the subsection. The list is not complete. It is not possible to give a complete list of all the possible relevant factors. The decision as to a property division order is an exercise of judicial discretion, based on all relevant factors, aimed at achieving a reasonable, practical and just division which secures for each party the advantage they can fairly expect from having been married to one another, and avoids the disadvantage, to the extent they are not inevitable, of becoming divorced."

After going through the factors considered above, the evidence placed before me, the applicable law at the international, regional, and local level; it is my considered opinion that there is need to achieve a 50:50 share of the assets to achieve a reasonable, practical and just division of the assets of the parties and also dispose of the issues referred to trial.

Accordingly,

IT IS ORDERED THAT

1. Machipisa Farm, formally known as the remainder of Randhurst Grange Estate situate in the district of Goromonzi measuring 926.5930 hectares be subdivided by land surveyors appointed by the Master of the High Court, within 30 days of this order.
2. The property shall be subdivided into two portions with the plaintiff holding 777 hectares and the balance being awarded to the first defendant.
3. The costs of subdivision, including costs of registration of new title shall be borne by the plaintiff and the first respondent in proportion to the subdivision.
4. The plaintiff and first defendant are each awarded 50% equity in Zororo Energy (Private) Limited. The parties shall sign the necessary documents to effect the shareholding within ten days of this order, failing which, the Sheriff of the High Court is authorised to sign in the place and stead of a defaulting party.
5. The first defendant's counterclaim in respect of the alleged misappropriation of USD 2.7/2.3 million dollars be and is hereby dismissed.

6. Each party to pay his/her costs in this matter and in HC 1859/20 as reserved under judgment HH 832/20.

Atherstone & Cook, Plaintiff's Legal Practitioners
T Pfigu Attorneys, First Defendant's Legal Practitioners.